86-2043 86-2044
No. 86-

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, NEW YORK TELEPHONE COMPANY and CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL,

Respondent.

APPENDIX TO PETITION

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June 22, 1987

84 pp

TABLE OF CONTENTS

APPENDIX

Opinion of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

Argued November 12, 1986; decided Decmber 19, 1986

In the Matter of

JOSEPH CAHILL,

Respondent,

v

PUBLIC SERVICE COMMISSION et al.,

Appellants,

and

CENTRAL HUDSON GAS AND ELECTRIC CORPORATION,

Intervenor-Appellant.

SUMMARY

APPEALS, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court, entered February 7, 1986, which affirmed an order of the Supreme Court at Special Term (Lawrence E. Kahn, J.; opn 128 Misc 2d 510), entered in Albany County in a proceeding pursuant to CPLR article 78, denying motions by respondents to dismiss the petition. The following question was certified by the Appellate Division: "Did this court err, as a matter of law, in affirming Special Term's order which denied respondents' motions to dismiss the petition?"

Matter of Cahill v *Public Serv. Commn.*, 113 AD2d 603, affirmed.

OPINION OF THE COURT

HANCOCK, JR., J.

We hold that acts of the New York State Public Service Commission (PSC) in setting rates which compel a utility customer to pay for charitable contributions made by the utility constitute governmental conduct giving rise to a cognizable claim by that customer that his rights under the First Amendment of the United States Constitution have been violated.

I

In a CPLR article 78 proceeding against the PSC and New York Telephone Company (New York Tel.), petitioner, a customer of New York Tel., seeks to annul two actions of the PSC:

(1) The policy adopted by the PSC in 1970 whereby charitable contributions by utilities are allowed as "proper operating expenses" (*New York Tel. Co.*, case 25155, 10 NY PSC 345, 378, 84 PUR3d 321, 349 [July 1, 1970])[1] and

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[1] Prior to 1970 the PSC refused to allow inclusion of charitable contributions as operating expenses on the grounds that they were "not necessary to the conduct of business and that they [were] made at the sole discretion of Company officers to donees of their choosing." (*New York Tel. Co.*, case 25155 [July 1, 1970], at p. 378.) The 1970 policy allows charitable contributions as "proper operating expenses" provided they are "not excessive in total" and that the donations are not irrelevant to the "civic responsibilities" of the utilities. Future allowances are to be measured from pre-1970 contribution levels.

(2) The PSC "Opinion and Order Determining Revenue Requirement and Rate Structure" dated June 22, 1984 (opinion No. 84-16) specifically authorizing, New York Tel. to charge its ratepayers, including petitioner, for charitable donations of approximately $3,000,000 in 1984, and establishing rates to be paid by customers for service which are based on the inclusion of these contributions as operating costs.

Petitioner, a Catholic, alleges that as a consequence of the PSC policy and rate order he is compelled to contribute to "religious institutions" espousing beliefs inconsistent with his own, to charities supporting "the right to an abortion" contrary to his "moral and religious" beliefs and to causes which he finds objectionable on "personal and political grounds". "No matter how small a portion of his bill is affected", he says, he opposes these contributions "as a matter of principle" and he asserts that the PSC has denied him his constitutional rights under the free speech, free exercise and establishment clauses of the First Amendment of the Federal Constitution, citing *Abood v Detroit Bd. of Educ.* (431 US 209).

In lieu of answering the petition, respondents [2] moved to dismiss (CPLR 7804 [f]; 3211 [a] [7]) contending, among other things, that the utilities' actions in passing along the cost of charitable contributions were essentially private decisions and that the government's limited involvement was an insufficient basis for finding a violation of petitioner's First Amendment rights, citing *Jackson v Metropolittan Edison Co.* (419 US 345) and *Blum v Yaretsky* (457 US 991). Special Term rejected respondents' argu-

[2] Central Hudson Gas and Electric Corporation, which supplies electricity to petitioner, was granted permission to intervene in this proceeding, and joined in the PSC's motion to dismission the petition.

ments (128 Misc 2d 510) and the Appellate Division, with a divided court, affirmed, holding that petitioner had adequately stated a "threshold claim of 'State action'" by "alleging that the PSC adopted a policy which permitted the costs of charitable donations to be passed along to ratepayers" (113 AD2d 603, 606). The dissenters found that this case fell "squarely under" *Blum* and *Jackson* and that petitioner had failed to allege a sufficient nexus between the challenged acts and the State (*id.*, at p 609).

The Appellate Division granted respondents permission to appeal to our court and certified the following question: "Did this court err, as a matter of law, in affirming Special Term's order which denied respondents' motions to dismiss the petition?" For reasons which will appear, we hold that the question should be answered in the negative and that the order of the Appellate Division affirmed.

II

The critical issue is whether the petitioner's CPLR article 78 proceeding involves private conduct of a utility in which the State has merely acquiesced, as respondents and the dissenters contend, or governmental conduct of an agency of the State itself. Because it involves the latter we hold that under the controlling authority of *Abood v Detroit Bd. of Educ.* (431 US 209, *supra*) the petition states a cognizable claim that the 1970 policy decision and the 1984 rate order of the PSC violate petitioner's rights under the First and Fourteenth Amendments of the United States Constitution. In *Abood,* plaintiffs, nonunion teachers, challenged the validity of a union shop clause in the collective bargaining agreement between their employer and the teachers' union because dues they were compelled to pay were being used by the union for legislative lobbing and for the

support of political candidates. The Supreme Court, in holding that plaintiffs' rights were infringed by being forced to pay a portion of these contributions under threat of loss of their jobs, stated (at pp 235-236):

"[T]he freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

" 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia Bd. of Ed.* v. *Barnette,* 319 U.S. 624, 642.

"These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso* v. *Watkins,* 367 U.S. 488, or to associate with a political party, *Elrod* v. *Burns, supra;* see 427 U.S., at 363-364, n. 17, as a condition of retaining public employment.

* * *

"We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. *Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.*" (Emphasis added.)

There is no basis for distinguishing *Abood*. The acts giving rise to the claims here and in *Abood* were not the private decisions of the utilities and the union to make charitable and political contributions but the governmental actions in compelling the utility customer here and the non-

union teachers in *Abood* to pay for them. In *Abood* the coercion came from the State-sanctioned union shop clause under which nonunion members could be discharged for nonpayment. In this proceeding, the coercion results from the fact that the State establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.

The dissent points to no difference between the coercive effect of the PSC rate directives and the coercive effect of the union shop clause in *Abood.* Instead, for purposes of its argument, it constructs a model of a utility which omits the utility's distinguishing characteristic as a legalized monopoly—public control. The dissent then analyzes the utility's behavior "without any governmental intervention at all" (dissenting opn, at pp. 278-279) as though it were a private company and readily concludes that "utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they might choose to make", and that "the PSC has done no more than merely refuse to interfere with what is essentially a private decision." (Dissenting op, at p 279). To reach these conclusions, it must be emphasized, the dissent has assumed the validity of two propositions: that "the regulatory powers of the State [are] not involved in the rate-setting process" (dissenting opn, at p 279) and that the charitable contributions reflected in the rates are "charges in which the PSC has, in the truest sense of the word, merely 'acquiesced' " (dissenting opn, at p 278). But these assumptions find no support in law or fact.

A public utility is franchised by the State (Public Service Law §§ 68, 99) to provide services to the public at just

and reasonable rates (Public Service Law §§ 65, 91) in exchange for a proper return on its investment (*see,* Public Service Law § 97; *Matter of Village of Boonville v Maltbie,* 272 NY 40). Operating as a monopoly (*see, People ex rel. New York Edison Co. v Willcox,* 207 NY 86, 93-94), it is subject to regulation by the PSC (Public Service Law §§ 66, 94). The PSC oversees the utilities for the public good as an exercise of the State's police powers (*People ex rel. New York Elec. Lines Co. v Squire,* 145 US 175) and has exclusive authority to determine just and reasonable rates (Public Service Law §§ 66; [12]; § 92 [2]). It establishes maximum rates which may not be exceeded (Public Service Law § 65 [1]; § 91 [1]). In fact, no utility may charge more or less than the rates established by the PSC (see, Public Service Law § 66 [12]; § 92 [2]).

Aside from the fallacy of comparing a public utility to a private company because of the utility's uniquely public character, the analogy which the dissent draws to the decisions of corporate officials of a private company in making charitable contributions (dissenting opn, at p 279) cannot stand for a more basic reason. What is at issue here is *not the conduct* of the utility officials, but the policy and directives of the PSC in establishing utility rates which include charitable contributions as operating expenses. And in any event the effect of a decision of a private corporation to pass through to its customers the costs of charitable contributions simply cannot be compared with the action of the PSC in setting utility rates which include such contributions. In the case of a private corporation a customer who disapproves has a voice—he may decide not to buy the product. In the case of a utility the customer has no voice—the contribution is locked into the rate approved by the PSC, and the customer must pay or go without service.

For the same basic reason—that this proceeding challenges the public conduct fo the PSC and not the private conduct of the utilities—*Jackson v Metropolitan Edison Co.* (419 US 345, *supra*) and *Blum v Yaretsky* (457 US 991, *supra*) are inapplicable. In *Jackson* the suit was against the utility and not the Pennsylvania Utility Commission. The basis of the lawsuit was solely the private act of the utility in shutting off electric service, and the court simply dismissed plaintiff's arguments that that private conduct should be attributed to the State merely because of its role in regulating the utility and in approving the regulations under which the termination was effected. Similarly, in *Blum* the actions which the nursing home patients sought to attribute to the State were decisions made by "utilization review committees" of private nursing homes to transfer patients to facilities providing less intensive medical care. The court held that these committee decisions did not become State action solely because the nursing homes were subject to State regulation and the State responded to the decisions by adjusting the patients' Medicaid benefits.

To bring the case within *Jackson* and *Blum,* the dissent, referring to the PSC's brief (dissenting opn, at p 278), minimizes the function of the PSC in rate setting and characterizes its role as little more than passive acquiescence. Such a narrow view of the PSC's function, as already noted, is at odds with the broad grant of rate-setting authority vested in the PSC by the Legislature (Public Service Law §§ 66, 72, 91). It also runs counter to our own decisions holding that the function of rate setting is left to the discretion of the Public Service Commission, and that so long as rates are just and reasonable, they may not be set aside (*see, Matter of Abrams v Public Serv. Commn.,* 67 NY2d 205, 211-212; *Matter of New York State Council of Retail Merchants v Public Serv. Commn.,* 45 NY2d 661).

As to petitioner, a customer who must purchase service from a public utility at rates established by the State, the combined effect of the utility's monopoly status and the rate order is no less coercive than the threat of employment loss in *Abood*.[3] Like plaintiffs, who had a right to hold their jobs in *Abood*, petitioner, a member of the public in the utility's franchised area, has an unquestioned legal right to utility service (Public Service Law §§ 65, 91). Like the plaintiffs in *Abood*, he must forego that right or be subject to the "compulsory subsidization of ideological activity" condemned in *Abood* (431 US, at p 237) and its progeny (*see, Chicago Teachers Union v Hudson*, 475 US —, 106 S Ct 1066; *Ellis v Railway Clerks*, 466 US 435; *Galda v Bloustein*, 686 F2d 159). That petitioner's proportionate share of the objected to contributions is small is of no moment, "[f]or, whatever the amount the quality of [petitioner's] interest in not being compelled to subsidize the propagation of political or ideological views that [he] oppose[s] is clear" (*Chicago Teachers Union v Hudson*, 475 US, at p —, 106 S Ct, at p 1075).[4] To petitioner Cahill one salient fact remains: he is compelled to support

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[3] We note that the current policy of the PSC in permitting utilities to include charitable contributions as costs conflicts with judicial decisions in other jurisdictions holding similar pass-through provisions unlawful as involuntary levies on ratepayers (*see, e.g., Pacific Tel. & Tel. Co.* v. *Public Utils, Commn.*, 62 Cal 2d 634, 401 P.2d 353 [1965]; *Chesapeake & Potomic Tel. Co.* v. *Public Serv. Commn.*, 230 Md 395, 187 A2d 475 [1963]; *Illinois Bell Tel. Co.* v. *Illinois Commerce Commn.*, 55 Ill 2d 461, 303 NE2d 364 [1973]; *State ex rel. Laclede Gas Co.* v. *Public Serv. Commn.*, 600 SW2d 222, 229 [Mo 1980], *appeal dismissed* 449 US 1072 [1981]).

[4] Justice Stevens in *Chicago Teachers Union* v. *Hudson* (475 U.S. —, 106 S Ct 1066, 1075), stressing the point that "[t]he amount at stake for each individual dissenter does not diminish [his] concern", writes: "In *Abood*, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical

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institutions he opposes on moral and religious grounds because he must subscribe to the utility and pay rates based, in part, on those contributions, or be deprived of his right to electric and telephone service.

We address only the question certified by the Appellate Division. The respondents' remaining contentions, that the petition should be dismissed due to petitioner's failure to exhaust administrative remedies, that the petition was not timely commenced, and that petitioner lacked standing to bring the proceeding are not before us. The certified question should be answered in the negative and the order of the Appellate Division should be affirmed, with costs.

DISSENTING OPINION

TITONE, J. (dissenting). Petitioner commenced this proceeding to challenge a decision of the Public Service Commission (PSC) that allows utility companies to pass along a portion of the cost of their charitable donations to their ratepayers. His challenge is based on the claim that the decision impairs petitioner's and other ratepayers' Federal First Amendment rights to freedom of expression and worship by requiring them to contribute indirectly to charitable groups espousing views antithetical to their own. However we may feel about the wisdom of the PSC's policy, we conclude that the State's regulatory involvement in the cost pass-along that petitioner finds offensive is an insufficient basis for finding that his rights have been impaired by the actions of a governmental entity. Accordingly, we dissent and vote to reverse the Appellate Division order.

The Public Service Commission decision that is challenged here was actually made in 1970. Prior to 1970, the

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(footnote continued from preceding page)

character of forcing an individual to contribute even 'three pence' for 'the propagation of opinions which he disbelieves' ".

PSC exercised its regulatory authority over utility rates by requiring the utilities' shareholders to absorb the cost of charitable contributions rather than passing those costs along to the consumer in the form of increased prices for utility service. The PSC rescinded this policy in 1970 and replaced it with a ruling allowing utilities to recover from ratepayers a portion of their charitable contribution costs calculated by a formula based on the individual utility's adjusted pre-1970 level of expenditure (*New York Tel. Co.*, case 25155, 10 NY PSC 345, 84 PUR3d 321, 349-350). This change in policy reflected the PSC's view that charitable contributions can be a legitimate business expense that ought to be recognized as a form of overhead. In its ruling, the PSC stated that "it is not our function to screen lists of contribution, to pick out the good from the bad," but it further noted that it was "prepared to examine carefully claims for charitable contributions" and would disallow such claims "if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility" (*New York Tel. Co.*, 10 NY PSC, at p 379, 84 PUR3d, at p 349). In accordance wtih this policy, the PSC, in June of 1984, approved a request by the New York Telephone Company to include in its rates to consumers part of the cost of its contributions to several thousand charitable organizations. Petitioner thereafter commenced the present CPLR article 78 proceeding, arguing that the PSC's actions in approving the pass-along violated both the establishment and freedom of expression clauses in the First Amendment of the Federal Constitution.[1] Petitioner's constitutional claim is based

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[1] Petitioner has not asserted any claim that his rights under our State Constitution (NY Const, art I, § 8) have been violated (*compare, SHAD Alliance* v. *Smith Haven Mall,* 66 NY2d 469, *with Sharrock* v *Dell Buick-Cadillac,* 45 NY2d 152).

largely on the Supreme Court's decision in *Abood v Detroit Bd. of Educ.* (431 US 209), in which the court held that forced indirect contributions to political groups in the form of mandatory agency-shop dues violates an employee's right to freedom of expression. In *Abood,* however, the dues payments were mandated by a collective bargaining agreement between the union and a governmental employer and were enforced by that employer's coercive power to discharge those who did not wish to participate. Thus, there was no doubt in *Abood* that the constitutional violation complained of was the product of State action.

Here, in contrast, the question of the State's involvement is very much in dispute. Although petitioner insists that his quarrel is solely with the policy decision of the PSC, a governmental entity, it is apparent that the real source of his aggrievement is the action of the private utility, which, through the inherently coercive power of its status as a monopoly provider, is forcing him to make indirect contributions to charities he finds objectionable.[2] Consequently, although the majority concludes otherwise, *Abood* is manifestly not controlling here. What is more in point is the body of case law that addresses the problem of when the actions of a private entity may fairly be said to constitute "State action."

It is beyond question that the First and Fourteenth Amendments, upon which petitioner's claim depends, provide "no shield against merely private conduct, however * * * wrongful" (*Shelley v Kraemer,* 334 US 1, 13; *see,*

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[2] Contrary to the majority's view, that petitioner initially named the PSC and not the utility as the party defendant is of no consequence. In determining whether a claimed deprivation of a constitutional right involves an action by the State or merely a private decision, we look to the substance of the claim and not to the status of the party who has been sued (*see Blum* v *Yaretsky,* 457 US 991, 1003).

Hudgens v NLRB, 424 US 507; *SHAD Alliance v Smith Haven Mall,* 66 NY2d 396). Rather, those amendments protect only against those infringements of liberty that may in some sense be said to emanate from the actions of the State (*see, Jackson v Metropolitan Edison Co.,* 419 US 345). It has been candidly acknowledged that "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer" (*Jackson v Metropolitan Edison Co., supra,* at pp 349-350). Nonetheless, there are a number of previously applied standards that provide us with some guidance.

First, the fact that the private concern is heavily regulated by government is not alone sufficient to render the conduct of that private entity "State action" (*Jackson v Metropolitan Edison Co., supra,* at pp 350-353; *see, Blum v Yaretsky,* 457 US 991). While the actions of private concerns having these characteristics may "more readily be found to be 'state' acts" than will the actions of others, there must still be a "sufficiently close nexus between the State and the challenged action * * * so that the action * * * may be fairly treated as that of the State itself" (*Jackson v Metropolitan Edison Co., supra,* at p 351). Significantly, this "nexus" cannot be established by simply showing that the private entity provides an essential public service or has a monopoly on the market, where the service in question is not one that the State would traditionally provide (*id.,* at pp 351-353).

A sufficient nexus may be demonstrated where the private action in question was compelled or directed by the State (*see, Blum v Yaretsky, supra,* at pp 1004-1005; *Jackson v Metropolitan Edison Co., supra,* at p 457). Alternatively, "State action" may be found to exist where the State "has exercised coercive power or has provided significant en-

couragement" so that the private choice may be deemed to be effectively that of the State (*Blum v Yaretsky, supra,* at p 1004; *see, Flagg Bros. v Brooks,* 436 US 149, 166). What is made absolutely clear by the case law, however, is that the State's mere acquiescence in the conduct of a regulated private entity does not transform an essentially private choice into a governmental action (*Blum v Yaretsky, supra,* at pp 1004-1005; *Jackson v Metropolitan Edison Co., supra,* at p 357; *see Montalvo v Consolidated Edison Co.,* 92 AD2d 389, *aff'd on opn below* 61 NY2d 810).

In this case, petitioner argues that the charitable contribution pass-along has the earmarks of State action because the combination of the State's intensive involvement in rate-setting and the utilities' status as franchised monopoly providers results in his having to make forced contributions under the State's sponsorship. In this respect, however, petitioner's argument is no different in substance from that made by the dissenters and explicitly rejected by the majority in *Jackson v Metropolitan Edison Co.,* (*supra,* at pp 351-352, 360-364 [Douglas, J., dissenting], at pp 366-373 [Marshall, J. dissenting]). Indeed, the majority's conclusion that "the combined effect of the utility's monopoly status and the rate order is no less coercive than the threat of employment loss in *Abood*" is virtually indistinguishable from Justice Douglas' argument that State action should be found to exist because "in the aggregate" such factors as Metropolitan Edison's State-authorized monopoly, its unilateral control over an essential public service and the "framework of extensive state supervision and control" warranted that conclusion (*id.,* at pp 361-362 [Douglas, J., dissenting]). While it is true that, as a practical matter, the utilities' monopolistic status gives

them a power to coerce that is equal in some respects to the coercive power of government, that circumstance alone does not transform what has traditionally been a private activity into a governmental one. Accordingly, although the coercion present in *Abood* is analogous to the coercion present here, the fact remains that in this case, unlike in *Abood,* the coercion is an unfortunate by-product of private, not State, action.

Further, the fact that the PSC plays a vital role in the rate-setting process does not render the billing practices of the utilities the equivalent of "State action." The PSC was created by the Legislature to oversee utilities precisely because their monopoly status would otherwise enable them to engage unfettered in rate-setting and other practices inimical to the public welfare. Having undertaken to regulate utilities, however, the State did not thereby become the initiator of the utilities' actions.

It is true that providers of gas, electric and telephone services are not permitted to charge more than the PSC permits (*see,* Public Service Law § 65 [1]; § 91 [1]), and once the permissible rates are established, the utilities are not free to charge their customers *less* (Public Service Law § 66 [12]; § 92 [2]). However, the process by which those rates are established amply demonstrates that it is the utility, and not the PSC, which is the initiator of the disputed pass-along decision. As described in the PSC's brief, the process consists, in simplified form, of the utility's submitting a schedule of "revenue requirements" calculated on the basis of anticipated operating expenses. The PSC reviews these schedules and determines which items of projected expenses should be disallowed. The remaining "revenue requirements" then become the basis of the rates the utilities' customers pay. Manifestly, these are charges

in which the PSC has, in the truest sense of the word, merely "acquiesced" by failing to disallow them.

When examined closely, petitioner's claim amounts to nothing more than a contention that the State has refused to interfere with the utilities' decisions to pass along their charitable contribution costs to their customers, the ratepayers. There is no allegation that the PSC has compelled this activity, and, indeed, there could be none. Nor can there be any colorable claim that the activity by which petitioner feels himself aggrieved is, overtly or covertly, coerced by the State, since it is virtually inconceivable that the coercive powers of the government would be necessary to induce private concerns such as the utilities involved in this case to pass along their costs rather than absorbing those costs themselves.

Indeed, the key to analysis in a case such as this is to subtract the government from the equation and then consider what the behavior of the private entity would be without any governmental intervention at all. As the Supreme Court has stated, "[t]he nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval" (*Jackson v Metropolitan Edison Co., supra,* at p 357). Here, if the regulatory powers of the State were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they might choose to make.[3] By allowing these utilities to

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[3] Contrary to the majority's assertion (majority opn., at p 271), we do not advance the PSC's noninvolvement in rate-setting as a

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engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no State involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision.[4]

To be sure, one of the motivating factors behind the PSC's change in policy may well have been a desire to spur utilities to make charitable donations and thereby contribute to the public welfare (*see, New York Tel. Co.*, 10 NY PSC, at pp 378-379, 84 PUR3d, at pp 349-350, *supra*). This underlying intention, however, does not constitute the type of "significant encouragement" that will convert the private decision at issue here into a governmental one (*cf. Blum v Yaretsky, supra*, at pp 1008-1009, n 19). Indeed, while the PSC may have intended to encourage private contribution, an activity which is itself unobjectionable, it has done nothing affirmatively to encourage the utilities to pass along the attendant costs to their

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"valid proposition" that requires "support in law or fact." Rather, we merely posit that noninvolvement hypothetically, as a means of demonstrating that, despite the majority's suggestion to the contrary (at p 273), the utilities' power to charge rates for their services is not derived from the PSC, but rather is a natural incident of their status as owners of those services.

[4] To the extent that private business concerns choose to make such donations out of their profits, it may be that they do so because of their belief that the market will not tolerate an increased price for their goods or services. Of course, utilities generally do not need to make such sensitive price calibrations, since their services are public necessities and the consumer simply cannot take this business elsewhere. Thus, to a large extent, utilities are free, in the absence of regulation, to pass along many types of business expenditures that other corporations would elect to absorb. This circumstance, however, is a by-product of utilities' status as monopolies, and not a result of any governmental intervention.

customers. Again, that is a decision which the PSC has merely approved or, more specifically, failed to interdict.

We note in closing that there is no allegation, in either the pleadings or the papers submitted on the dismissal motion, that the PSC has actually engaged in a qualitative review of the donees the utilities select as the objects of their generosity.[5] In contrast, the PSC has asserted that it has never required utilities to make charitable contributions or to select particular organizations for the contributions they choose to make. Further, the PSC has alleged that it has never interfered with a utility's choice of donees, although in 1970 it indicated that it might do so. Had it done so, our disagreement with the majority might not have been so acute.

In sum, it is evident that the PSC is not the source of petitioner's grievance and, consequently, we cannot agree that his rights under the First and Fourteenth Amendments have been violated. While the PSC has the power to, and in fact has in the past, forbid the practice to which petitioner objects, its refusal to exercise its authority in that manner now does not imbue the utilities' conduct with the characteristics of "State action." Thus, while reasonable minds may differ as to the wisdom of the PSC's policy of nonintervention in this area, it cannot be said that Federal constitutional rights are implicated. Inasmuch as we are bound by Supreme Court precedent in interpreting the Federal Constitution, we can reach no other conclusion than that the petitioner's proper remedy, if remedy there should

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[5] Although Special Term indicated that petitioner had made such allegations, our own review of the papers does not bear out this conclusion. Indeed, in the briefs petitioner submitted in response to the dismissal motion, he acknowledged that the "recipients are selected solely at the discretion of the utility" and that "it is the express policy of the PSC not to regulate or screen the contributions or their recipients."

be, rests with the Legislature, which has the authority to direct the PSC in the use of its regulatory powers (*see, e.g.*, Public Service Law § 91 [2] [b]).

Accordingly, we would reverse the order of the Appellate Division and dismiss the petition in its entirety.

Judges MEYER, SIMONS, KAYE and ALEXANDER concur with Judge HANCOCK, JR.; Judge TITONE dissents and votes to reverse in a separate opinion in which Chief Judge WACHTLER concurs.

Order affirmed, etc.

Order of the Court of Appeals Denying Rehearing

COURT OF APPEALS

STATE OF NEW YORK

Mo. No. 140

In the Matter of

JOSEPH CAHILL,

Respondent,

vs.

PUBLIC SERVICE COMMISSION, et al.,

Appellants,

CENTRAL HUDSON GAS AND ELECTRIC CORP.,

Intervenor-Appellant.

Motions for reargument and for clarification denied.

Mar 24 1987

Opinion of the Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

January 23, 1986

In the Matter of

JOSEPH CAHILL,

Respondent,

v

PUBLIC SERVICE COMMISSION et al.,

Appellants,

and

CENTRAL HUDSON GAS AND ELECTRIC CORPORATION,

Intervenor-Appellant.

SUMMARY

APPEAL from an order of the Supreme Court at Special Term (Lawrence E. Kahn, J.), entered June 12, 1985 in Albany County, which, in a proceeding pursuant to CPLR article 78, denied motions by respondents to dismiss the petition.

Cahill v Public Serv. Commn., 128 Misc 2d 510, affirmed.

OPINION OF THE COURT

HARVEY, J.

Petitioner is a customer of both respondent New York Telephone Company and intervenor Central Hudson Gas and Electric Corporation. In October 1984, he commenced the instant CPLR article 78 proceeding seeking an order directing respondents to cease the practice of passing along the cost of charitable contributions to customers. Petitioner also sought an order amending respondent Public Service Commission's (PSC) June 22, 1984 rate order to eliminate the PSC's recognition and authorization of New York Telephone's practice of passing along the cost of its charitable contributions to its customers as part of the rates it was authorized to charge.

Respondents elected not to interpose an answer, but rather moved for dismissal of the article 78 petition asserting objections in point of law (CPLR 7804 [f]). Respondents asserted that the court lacked jurisdiction since the subject matter raised was within the exclusive purview of the PSC. Respondents also asserted that petitioner failed to exhaust administrative remedies and that the petition, which was predicated on a violation of petitioner's rights as set forth in US Constitution 1st and 14th Amendments, failed to state a cause of action.

Special Term denied respondents' motion in all respects (128 Misc 2d 510). That court properly noted its jurisdiction to entertain an article 78 proceeding which raises claims of a violation of constitutional rights as a consequence of actions taken by public regulatory bodies (*see, Consolidated Edison Co. v Public Serv. Commn.,* 447 US 530, 533; *see also, Matter of Consolidated Edison Co. v Public Serv. Commn.,* 107 AD2d 73).

Respodents contend as one of their objections in point of law that petitioner failed to state a cause of action for article 78 relief. Since respondents elected not to submit an answer prior to moving for dismissal of the petition by setting forth objections in point of law as provided for in CPLR 7804(f), their motion is one in the form of a CPLR 3211 motion addressed to the pleadings (*see, Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs.,* 63 NY2d 100, 102-103; McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:7, p 507). Examining the petition and accepting the facts alleged to petitioner, as we must, we find that the article 78 petition states a claim for relief (*see, Matter of Board of Educ v Allen,* 32 AD2d 985).

It is essential to the survival of this proceeding that the petition allege a violation of petitioner's 1st Amendment rights by some "State action". For, while the 14th Amendment provides protection of a citizen's constitutional rights from encroachment by State Government action, it has no applicability to private discriminatory or wrongful conduct (*Jackson v Metropolitan Edison Co.,* 419 US 345, 349-350). Petitioner states that the PSC established a policy in 1970 which permitted the utilities it regulates to pass along the cost of charitable donations to ratepayers. The PSC's "prime function * * * as a regulatory body, is [in separating] those costs which should be borne by ratepayers from those which are properly chargeable to shareholders" (*Rochester Gas & Elec. Corp. v Public Serv. Commn.,* 51 NY2d 823, 825, *appeal dismissed* 450 US 961). The PSC is a creation of the Legislature (Public Service Law §§ 3, 4; *see, Matter of Consolidated Edison Co. v Public Serv. Commn.,* 47 NY2d 94, 102, *revd* 447 US 530). By alleging that the PSC adopted a policy which permitted the costs of

charitable donations to be passed along to ratepayers, petitioner has adequately stated the threshold claim of "State action" (*Jackson v Metropolitan Edison Co., supra,* pp 349-350).

Petitioner goes on to allege in the article 78 petition that the policy promulgated by the PSC results in ratepayers' funds being directed to a variety of charitable causes without any notice to, or input by, those individuals. Petitioner also contends that donations made to specific charities are violative of his religious beliefs. Petitioner's claim for relief is that the PSC's policy constitutes unlawful State action since it has the end result of compelling an individual ratepayer to indirectly support an organization whose philosophy the ratepayer opposes on religious or other personal grounds. Accepting petitioner's allegations and construing them in his favor, we find that he has stated a cause of action which alleges a violation of his rights under US Constitution 1st and 14th Amendments (*Torcaso v Watkins,* 367 US 488; *see, Wooley v Maynard,* 430 US 705; *see also, Abood v Detroit Bd. of Educ.,* 431 US 209).

Respondents' contention that petitioner has failed to exhaust his administrative remedies does not present a bar to the court's entertaining the instant petition. Where, as here, a petitioner's claim is based solely on a constitutional challenge, the exhaustion of administrative remedies requirement is inapplicable (*Matter of Emery v LeFevre,* 97 AD2d 931, 932). The proceeding is timely since the nature of the relief sought by petitioner is to address an alleged continuing violation of his constitutional rights (*see Matter of Burke v Sugarman,* 35 NY2d 39, 45).

LEVINE, J. (dissenting). In our view, under current State-action principles applied by the United States Supreme Court (*see, Blum v Yaretsky,* 457 US 991; *Rendell-Baker*

v Kohn, 457 US 830; *Flagg Bros. v Brooks,* 436 US 149; *Jackson v Metropolitan Edison Co.,* 419 US 345), petitioner has failed to plead any violation of his 1st Amendment rights on the part of respondent Public Service Commission (PSC). State-action analysis begins with "careful attention to the gravamen of the plaintiff's complaint" (*Blum v Yaretsky, supra,* p 1003). The gravamen of the complaint in the instant case is found in paragraphs 7, 8 and 9 of the petition. The constitutional deprivation complained of is that petitioner is being "compelled to support * * * charities * * * by means of including coerced contributions in his utility bills" (para 7); that the PSC *"permits* the New York Telephone Company and all New York utilities which it regulates to dispose of their charitable contributions extracted from their customers in any manner each utility determines without any protection for the interests of the customers" (para 8; emphasis supplied); and petitioner "has no alternative means of obtaining the basic utility services the New York Telephone Company provides him in his home geographic area" (para 9).

Nowhere in the foregoing key allegations, nor elsewhere in the petition, are facts pleaded which attribute the claimed constitutional deprivation to the PSC other than indirectly through its purely regulatory authority over respondent New York Telephone Company (NYT). Any invasion of petitioner's 1st Amendment rights directly results from the acts of NYT, a private corporation. It is NYT, and not the PSC, that adds the proportionate share of the cost of its charitable donations to petitioner's telephone bill and threatens petitioner with discontinuance of service if the bill is not paid in full. This being the case, to establish the requisite State action on the basis of NYT's acts, there must be found "a sufficiently close nexus between the State and the chal-

lenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" (*Jackson v Metropolitan Edison Co., supra,* p 351). Detailed inquiry may be required as to the true nature of the State's involvement *(supra).*

The Supreme Court has rather precisely enunciated the test for State action when the constitutional challenge is made to the decisions or the acts of a private entity. A State normally can be held responsible "only when it has *exercised coercive power* or has provided such *significant encouragement,* either overt or covert", that the act or decision is deemed that of the State itself; "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient" (*Blum v Yaretsky, supra,* p 1004; emphasis supplied). The only other identified instance of imputing to a State the results of private initiative is when the private entity exercises powers that are " 'traditionally the exclusive prerogative of the State' " (*supra,* at p 1005, quoting *Jackson v Metropolitan Edison Co., supra,* p 353).

The petition and other papers submitted at Special Term simply did not meet the foregoing requirements for attributing NYT's acts to the PSC. The record is devoid of anything but conclusory allegations of the PSC's overt or covert encouragement to NYT's charges of which petitioner complains. The PSC's policy, announced in a 1970 ruling permitting utilities to include charitable contributions as a legitimate operating expense, is entirely neutral on the issue. It merely recognizes the modern reality of corporate life that it is good business for corporate citizens (utilities included) to support charitable causes in the communities where they exist and operate. The 1970 ruling expressly disclaimed any screening function in approving charitable contributions as a utility-operating expense except as to

whether such contributions are truly eleemosynary. Petitioner has not set forth any factual basis suggesting that the PSC has deviated from that position in the 15 years that the policy has been in effect. Demonstrative of the absence of any overt or covert encouragement is the fact that the PSC has limited its approval to pre-1970 utility contribution levels, adjusted for inflation. Such unaligned approval of or acquiescence in the utility practice of making charitable donations and then passing them on to customers is insufficient to hold the State responsible (*Blum v Yaretsky,* 457 US 991, 1004-1005, *supra*). The fact that approval of the challenged act of NYT by the PSC initially took the form of a general policy statement in 1970 does not support any inference of State encouragement. Even express statutory authorization of a private act does not convert such conduct into State action (*Flagg Bros. v Brooks,* 436 US 149, 165, *supra*).*

Nor has petitioner pleaded any facts or otherwise shown that the PSC has itself exercised any coercive power to exact a share of NYT's philanthropies from him. As previously discussed, the PSC does not mandate the making of contributions and does not require any utility to file a proposed rate tariff which includes such contributions as a recoverable operating expense. No rule, regulation or practice has been cited by petitioner to support any inference that the PSC would *require* termination of telephone service were a subscriber to deduct from his utility bill the portion thereof attributable to such contributions.

Similarly unaivailing is petitioner's reliance on NYT's monopoly position in providing telephone service, a func-

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* To the extent that *Public Utilities Commn.,* v *Pollak* (343 US 451) may have held to the contrary, its precedential value has been virtually eliminated by *Jackson* v *Metropolitan Edison Co.* (419 US 345, 356).

tion heavily affecting the interest of the public. This ground for attributing the conduct of a public utility to a State was expressly rejected in *Jackson v Metropolitan Edison Co.* (419 US 345, 351-352, *supra*), which also held that the furnishing of utility service is not a function traditionally the exclusive prerogative of a State (*supra,* at p 353).

In short, the instant case falls squarely under *Blum* and *Jackson (supra).* In essence, they hold that the requisite nexus between the challenged act or decision of a private entity and a State is not established merely because (1) the entity is heavily regulated, (2) its market position is enhanced by State regulation, and (3) a State regulatory agency has authority to prevent the conduct complained of. Nothing more has been shown here.

Contrary to petitioner's contention, *Abood v Detroit Bd. of Educ.* (431 US 209) does not support the opposite conclusion. In *Abood,* the Supreme Court struck a Michigan labor statute sanctioning an "agency shop" contract requiring nonunion member employees to pay a service fee equivalent to union dues as a condition of employment, insofar as such fees may be applied to fund political activities of the union. *Abood* is quite distinguishable. First, *Abood* notes that such an agency or union shop contract is an integral element of an express legislative policy to foster exclusive representation of employees in the collective bargaining process (*supra,* at pp 220-222). Here, as has already been discussed, the PSC's policy is neutral as to the challenged action of NYT. Secondly, as the State-action discussion in *Abood* explains (*supra,* at p 218, n 12), it is only by virtue of legislative approval that such agency shop arrangements are enforceable. In the instant case, the PSC's power to prevent the charging of customers for the utilities' donations is totally derived from the PSC's

general rate-setting authority. Without that regulatory control, NYT, like any other private corporation, would be free to pass on its charitable expenses as a cost of doing business. Finally, once the agency shop contract in *Abood* was entered into, Michigan law *mandated* the employer to discharge any nonunion employee who refused to pay the service fee, and a third party (the union) was given the right to enlist the coercive power of the State to enforce that obligation on the part of the employer. No such coercive power, either to mandate NYT's imposition of the challenged charges or to terminate petitioner's telephone service for nonpayment thereof, has been pleaded here.

For all the foregoing reasons, Special Term's order should be reversed and the petition dismissed.

MAIN, J. P., and YESAWICH, JR., J., concur with HARVEY, J.; MIKOLL and LEVINE, JJ., dissent and vote to reverse in an opinion by LEVINE, J.

Order affirmed, with costs.

Opinion of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM—ALBANY COUNTY

May 14, 1985

JOSEPH CAHILL,

Petitioner,

v

PUBLIC SERVICE COMMISSION *et al,*

Respondents.

OPINION OF THE COURT

LAWRENCE E. KAHN, J.

In the above-captioned CPLR article 78 proceeding, petitioner seeks to require the respondent Public Service Commission (PSC) to abandon its policy of permitting public utilities to include charitable contributions as authorized expenditures in establishing utility rates. The instant litigation challenges the PSC's policy upon the narrow issue that it violates petitioner's 1st Amendment right of free expression and freedom of religion. The court has granted prior motions to add New York Telephone Company (Company) as a necessary party and further, to permit intervention by Central Hudson Gas and Electric Corporation. No answer has been served. All respondents have moved to dismiss the petition on various grounds, including lack of subject matter jurisdiction, Statute of Limitations, and failure to exhaust administrative remedies.

Initially, it is clear that this court has subject matter jurisdiction to render a determination on the merits of petitioner's allegations, and that the doctrine of exhaustion of administrative remedies is not a bar to the present litigation. Relief is sought in the nature of mandamus vis-à-vis the PSC. Petitioner seeks no relief against any specific utility, but rather, challenges a policy of the PSC which has been in effect since 1970. As such, there is no special expertise which would necessitate that this court defer to an administrative agency for a resolution of the dispute. Rather, resolution of the issue is grounded in constitutional considerations and thus certainly within the purview of this court. Similarly, a determination on the merits need not be avoided by dismissal for failure to exhaust administrative remedies. Petitioner raises only constitutional issues, and seeks no monetary relief. The submissions before the court are replete with reference to the PSC's continuing adherence to the principle that inclusion of charitable contributions in operating expenses of a utility is acceptable for rate-making purposes. The policy was first articulated in case 25155, July 1, 1970, and repeated in the latest rate-making determination which is the subject of this challenge (case 228601). While there have been various individual objections from within the PSC concerning this policy, and introduction of proposed legislation to alter it, such a result has never been achieved. Given these realities, and the limitation of this litigation to constitutional claims, a dismissal for failure to exhaust administrative remedies would be the supreme example of invoking form over substance (*Matter of First Natl. City Bank v City of New York Fin. Admin.*, 36 NY2d 87; *Usen v Sipprell*, 41 AD2d 251).

Finally, respondents seek dismissal premised upon petitioner's failure to state a cause of action under either US

Constitution 1st or 14th Amendment. In resolving this issue, it has long been recognized that "if a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated and no motion lies" (*Foley v D'Agostino,* 21 AD2d 60, 65, n 1). The test is twofold. The pleading must give notice of the transactions relied upon and assert sufficient material elements to constitute a cause of action (*Jerry v Borden Co.,* 45 AD2d 344). Petitioners are to be afforded the benefit of every possible favorable inference (*Rovello v Orofino Realty Co.,* 40 NY2d 633).

While respondents have not yet answered, apparently the PSC allows inclusion of charitable donations as a cost of doing business in establishing rate structures for public utilities. This policy has existed since 1970. The amount is established pursuant to a formula premised upon pre-1970 corporate charitable donations, trended forward with an inflation factor. On or about June 22, 1984, the PSC, in determining a rate request for New York Telephone, allowed inclusion of charitable donations for 1984 in the sum of approximately $3,000,000. Petitioner alleges that he is a practicing Catholic and objects to funding of charities which support the right to an abortion. He further asserts that the above denies him the rights of free expression and free exercise of religion, and most importantly, that the activities of the PSC constitute "state action" within the purview of 42 USC § 1983, and as such, violate his aforesaid 1st Amendment guarantees.

Petitioner relies upon *Abood v Detroit Bd. of Educ.* (431 US 209), for the proposition that the policy of the PSC constitutes "state action." Quoting Thomas Jefferson, the *Abood* court reiterated that " ' "to compel a man to furnish contributions of money for the propagation of opinions

which he disbelieves, is sinful and tyrannical" ' " (p 235, n 31). While this court is enthusiastic in its indorsement of such a philosophy, nevertheless, it is applicable to the case at bar only if petitioner actually establishes that "state action" is present. State action "is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the acts complained of (see: *Jackson v Metropolitan Edison Co.*, 419 U. S. 345, 351)." (*Karp v Consolidated Edison Co.*, Spec Term, NY County, May 24, 1984, calendar Nos. 71, 151.)

The philosophy of corporate charitable contributions is rooted in the notion that a business should be an integral part of the community and benefits when it helps bolster the quality of life in the area it serves. Such contributions tend to enhance customer relations and attitudes. Business Corporation Law § 202(a)(12) expressly provides that a corporation has the power "[t]o make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof."

The PSC's motion to dismiss is supported by affidavits asserting that it does not compel contributions, nor does it designate a particular charity or the exact amount of any contribution. However, the petition alleges the converse and that while the PSC may not actively participate in determining a utility's choice of charities in the first instance, this does not negate the presence of State action. Petitioner asserts that, in fact, each rate-making determination which approves a proposed charitable contribution must be viewed as a determination by the PSC, that the contribution is

allowable as "relevant to the civic responsibilities of the public utility" and not "demonstratively imprudent." As aforesaid, in 1970, the PSC determined for the first time to allow charitable contributions to be included as a necessary operating expense. "We are prepared to examine carefully claims for charitable contributions *** and if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely. The level of contributions during the period in which they were not considered allowable expenses will serve as benchmark for the future." Thus, the PSC's reservation of authority is twofold. It reserves the right to determine the *amount* of appropriate corporate contributions. It also reserves control of the *specific contribution,* approving only those which it deems relevant to the utility's civic responsibilities. Subsequently, it has also articulated a standard for disallowing charities which are "demonstratively imprudent."

"[A]cts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found in the 'state' acts than will the acts of an entity lacking these characteristics *** the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (*Jackson v Metropolitan Edison Co.,* 419 US 345, 351.) State action is present in each instance where the PSC applies its "relevant civic responsibility" test during the rate-making process. In such instances, the PSC is not merely affording a utility the choice of making a charitable contribution, but more significantly, and thereby creating a significant nexus, it is determining those charities which *it* feels comes within the standards which *it has set*

for acceptable charitable giving. Thus, the PSC is not merely acquiescing in an otherwise acceptable business practice, but is engaged in an active supervisory role on a continuing basis.

The petitioner alleges that respondents approve funding of charities who support practices which are violative of his religious beliefs. Assuming the truth of this allegation, as the court must at this stage of the litigation, it becomes apparent that such activity by the State would be prohibited by guarantees contained in US Constitution 1st Amendment. As such, the petition states a cause of action, thereby requiring denial of respondents' motion.

The motion to dismiss the petition upon the ground of lack of subject matter jurisdiction, failure to exhaust administrative remedies, that the proceeding is barred by the applicable Statute of Limitations, and that the petition fails to state a cause of action, shall be denied. All papers to attorney for petitioner, who shall submit an order in conformance herewith, with a copy of this decision annexed thereto. Respondents shall be granted 20 days in which to serve an answer. Thereafter, petitioner may renotice this proceeding on 10 days' notice at any subsequent appropriate Special Term.

Constitutional Provisions

Amendment I to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1 of the United States Constitution provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law.

New York Public Service Law

New York Public Service Law Section 92(2) provides:

2. No change shall be made in any rate, charge or rental, or joint rate, charge or rental which shall have been filed by a telegraph corporation or telephone corporation hereinafter in this subdivision called a utility in compliance with this chapter, except after thirty days' notice to the commission and to each county, city, town and village served by such utility which had filed with such utility within the prior twelve months a request for such notice and shall be affected by such change and publication of a notice to the public of such proposed change once in each week for four successive weeks in a newspaper having general circulation in each county containing territory affected by the proposed change, which notice shall plainly state the changes proposed and the time when they go into effect. All proposed changes shall be shown by filing new schedules or shall be plainly indicated upon the schedules filed and in force at the time and kept open to public inspection. The commission, for good cause shown, may, except in the case of major changes, allow changes in rates, charges or rentals to take effect prior to the end of such thirty-day period and without publication of notice to the public under such conditions as it may prescribe; all such changes shall be immediately indicated upon its schedules by such utility. For the purpose of this subdivision, "major changes" shall mean an increase in rates, charges and rentals which would increase the aggregate revenues of the applicant more than the greater of one hundred thousand dollars or two and one-half percent, but shall not include changes in rates, charges or rentals allowed to go into effect by the commis-

sion or made by the utility pursuant to an order of the commission after hearings held upon notice to the public. No utility shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable as specified in its schedule on file and in effect. Nor shall any utility refund or remit directly or indirectly any portion of the rate or charge so specified, nor extend to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are specified in its schedule filed and in effect and regularly and uniformly extended to all persons under like circumstances for the like or substantially similar service. Whenever there shall be filed with the commission by any utility, any schedule stating a new rate or charge, or any change in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, the commission may at any time within sixty days from the date when such schedule would or has become effective, either upon complaint or upon its own initiative, and, if it so orders, without answer or other formal pleading by the utility, but upon reasonable notice, hold a hearing concerning the propriety of such change, provided that if such change is a major change the commission shall hold such a hearing; and, pending such hearing and decision thereon, the commission, upon filing with such schedule and delivering to the utility, a statement in writing of its reasons therefor, may suspend the operation of such schedule, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after it goes into effect, the commission may make such order in reference thereto as would be proper in a proceeding begun

after the rate, charge, form of contract or agreement, rule, regulation, service, general privilege or facility has become effective. Provided that, if such hearing cannot be concluded within the period of suspension as above stated, the commission may extend the suspension for a further period, not exceeding six months. The commission may, as authorized by section ninety-seven, establish temporary rates, charges or rentals, for any period of suspension under this section. At any hearing involving a change or a proposed change of rates, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility; and the commission may give to the hearing and decision of such questions preference over all other questions pending before it.

During the suspension by the commission as above provided, the schedule, rates, charges, form of contract or agreement, rule, regulation, service, general privilege or facility in force when the suspended schedule, rate, charge, form of contract, rule, regulation, service, general privilege or facility was filed shall continue in force unless the commission shall establish a temporary rate.

Regulatory Decisions

Excerpt from *Re New York Telephone Co.,* 24 N.Y. P.S.C., 2627, 2693-97, 61 PUR 4th 337, 366-69 (1984)

Charitable Contributions

The Judges made a number of findings and recommendations regarding rate year charitable contributions by New York Telephone:

1. Citing our consistent treatment of the argument, they rejected the Coalition's contention that no charitable contributions may be recovered in rates.

2. They recommend adopting staff's primary proposal to follow the practice of the past 15 years by using a 1969 benchmark amount as adjusted for inflation.

3. They recommend rejecting staff's secondary proposal that the inflation adjusted benchmark be reduced by 12%—to reflect an equal reduction in Telephone Plant in Service (TPIS)—because we never have used TPIS as the basis for the benchmark.

4. They recommend rejecting staff's proposal to disallow $1,005,000 of contributions to the Telephone Pioneers of America because, in New York Telephone's last rate case, we said that "where the purpose of the organization's activities can fairly be characterized as either employee-related or charitable, we believe the better solution is to treat the related expenditures outside the scope of the charitable contributions benchmark." [1]

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[1] R.D., pp. 3141-3142, citing Case 28264, *supra,* Opinion No. 83-11, mimeo p. 120.

5. They recommend rejecting the company's proposal to treat expenses associated with its loan of employees program, matching gift program, and Summer Arts Festival outside the inflation adjusted 1969 benchmark because they thought these contributions were ordinary charitable contributions, distinguishable from the company's indirect support of charitable efforts by the Telephone Pioneers of America.
6. They recommend rejecting the argument that the company's contributions to the National Regulatory Research Institute (NRRI) should be classified as a charitable contribution and subject to the 1969 inflation adjusted benchmark.

The combined effect of the Judges' recommendations is to reduce the company's revenue requirement by about $2.57 million.[2] The company, staff, the Coalition, and DOL except to a number of the Judges' recommendations.

The Coalition, joined by DOL, renews its objection to any rate recovery of charitable donations in the absence of a showing that these amounts contribute to "just and reasonable" service, as it claims is required by PSL § 97(1). If such costs are to be included in rates, however, these parties urge that we permit a mechanism whereby ratepayers could have a voice in the selection of recipients of New York Telephone's charitable contributions because ratepayers are assertedly a better judge of who would benefit the most from these contributions. The Coalition also argues that we should disallow certain expenses to be incurred in connection with the Telephone Pioneers of America.

These are the same arguments raised in the company's last and next-to-last rate cases. In rejecting them, we said:

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[2] R.D. Appendix E, Schedule 5, line 22 as adjusted for income taxes.

> Here, as on numerous prior occasions, we reject the consortium's claim that all charitable contributions must be disallowed, because we have long held that the company's legitimate, necessary expenditures include such contributions unless they are demonstrably imprudent.[1]

We also found impractical a proposal to permit ratepayers to participate in selecting the recipients of the company's charitable contributions. The Coalition and DOL have not argued persuasively for abandonment of these precedents, and their exceptions are denied.

The company, for its part, excepts to the continued application of the benchmark limitation, contending its unrebutted evidence showed that newly emerging factors—such as federal cuts in aid to non-profit organizations, reductions in public service and the like—render inappropriate further application of the 1969 benchmark. And it renews its request that expenses associated with its loan of employees program ($90,000), matching gift program ($700,000) and the Summer Arts Festival ($25,000) not be treated as charitable contributions on the grounds these programs improve employee morale and thus fall within the same category of employee-related expenses as do contributions for the Telephone Pioneers of America.[1]

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[1] Cases 27995, *et al., supra,* Opinion No. 82-6, mimeo p. 34. See also Case 28264, *supra,* Opinion No. 83-11, mimeo pp. 120-121 (regarding total disallowance) and p. 120 (regarding the Telephone Pioneers of America).

[1] According to the company, the matching gift programs benefit employee-designated schools, which benefit those employees and ratepayers, and give employees a direct role and sense of involvement in the company's programs; the loaned employees improve job skills, develop a sense of accomplishment and, as members of the community, benefit from improvements to the agency to which they are loaned.

In reply, the Coalition denies that the rate effect of charitable contributions is as inconsequential as the company asserts and suggests that if these expense were so inconsequential, the company would not work so hard to shift their cost to its customers. Staff, meanwhile, notes that the company's arguments against continued application of the benchmark are the same as those we considered and found unpersuasive in the company's last rate case.[2] It also denies the company has refuted the Judges' distinction between indirect support of the Telephone Pioneers of America and direct support of the other assertedly "employee-related" programs. The benchmark, staff concludes, should be applied to all these expenses because they provide no greater employee benefit than any other charitable contribution.

On exceptions, staff also continues to press for a 12% reduction to the inflation adjusted 1969 benchmark to reflect "the impact of divestiture upon the size of NYT's operations." [3] According to staff, the 1969 level of contributions intrinsically reflects the company's size, and an adjustment, based on the reduction in TPIS due to divestiture, thus is warranted to account for the company's significant loss of operations. It sees the lack of a direct tie between TPIS and the charitable contribution benchmark as beside the point, because circumstances warranting such a comparison never arose previously. It contends we would clearly make an adjustment to the benchmark if the company lost, say, 95% of its operations and related TPIS, and it argues that the same logic supports adoption of its 12% reduction to the benchmark.

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[2] Case 28264, *supra,* Opinion No. 83-11, mimeo p. 120.

[3] Staff's Brief on Exceptions, p. 45.

The company replies that the benchmark had no relation to TPIS and that the needs of the communities and customers it serves are unchanged despite the reduction in TPIS. Staff's argument from the extreme case of a 95% reduction in operations and related TPIS is misplaced, according to the company, because though divestiture has reduced TPIS, it has left the company with the same service area, customer body, and community and charitable needs.

As staff suggests, we previously considered and found inadequate the company's reason for discarding the inflation adjusted benchmark. We see no reason to depart from that precedent, and we reject that part of the company's exception.

Whether the company's loan of employees program, matching gifts program, and Summer Arts Festival contributions are more like charitable contributions generally, or more like expenses incurred in connection with the Telephone Pioneers of America, is a question of degree, and we find the Judges' analysis of the issue to be reasonable. Indeed, adopting the company's argument could result in total abandonment of the benchmark, for almost any contribution could be said to improve employee morale to some degree. Accordingly, this aspect of the company's exception is denied as well.

Finally, the company now has the same service territory, customers, and communities to serve as it did before divestiture. Staff's exception therefore is denied, though we do not reach the issue of how we would respond in the more extreme case hypothesized by staff.

Regulatory Decisions

Excerpt from *Re New York Telephone Co.,* 10 N.Y. P.S.C. 345, 378-79, 84 PUR 3d 321, 349-50 (1970).

Charitable Contributions

NYT deducted as an operating expense an amount of $901,315 expended during the test year as charitable contributions. Of this amount, more than one-half, $467,251 was made to the United Appeal and Red Cross. The balance was made up of donations to hospitals, educational institutions, and other charitable, social, and community welfare organizations. NYT contends that it and its employees benefit directly from the activities of the beneficiaries of its contributions and that it should be permitted to treat these expenditures as operating expenses for rate-making purposes, as it does for Federal income tax purposes. In the past, this Commission has not permitted regulated utilities to include charitable contributions as an operating expense on the ground they are not necessary to the conduct of the business and that they are made at the sole discretion of Company officers to donees of their choosing. The proposed report, while making clear that the organizations to which the contributions had been made were worthy of support, disallowed the charitable deductions as an authorized expense on the basis of Commission precedent.

The Federal Government permits charitable contributions by a corporation to be deducted for tax purposes. As a result, the actual cost to the Company's customers is approximately one-half of the amount of the contributions. The Company, in protesting the disallowance, points out that the Illinois Commerce Commission has accepted charitable contributions as a proper operating expense.[22] The

[22] *Vrtjack v. Ill. Telephone Co.,* 32 PUR 3d 385, 387-388 (1959).

Federal Power Commission also has allowed such contributions to be included in the cost of servicing, stating:[23]

> ". . . We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Corporations throughout the country have come to realize that charitable contributions are no longer wholly voluntary. Most charities could not function were it not for corporate contributions, and the corporations themselves, recognizing their role in the communities in which they operate and their public interest obligations to these communities, have supplied charities with a large share of the funds needed to carry on their necessary community activities. We believe it is time that the Commission reconsidered its past position with regard to charitable contributions by utilities and, on such reconsideration, we conclude that the contributions made by NYT and reflected in this proceeding should be allowed as a proper operating expense.* We have examined the individual items and find that the Company has exercised prudence both as to the recipients of its contributions and in the amounts donated. We are prepared to examine carefully claims for charitable contributions by other public utilities and to recognize similar donations in a reasonable amount. However, we emphasze that it is not our

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[23] *United Gas Pipe Line Co.*, 31 FPC 1180, 1189; 54 PUR 3d 285, 295 (1964).

* *Editor's Note:* See interim report, Feb. 11, 1970, p. 88.

function to screen lists of contributions, to pick out the good from the bad, and if the amounts are excessive in total or if the donees as a group are not relevant to the civic responsibilities of the public utility, we may disallow the contributions entirely. The level of contributions during the period in whch they were not considered allowable expenses will serve as a benchmark for the future.

Respondent Cahill's Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

Index No.

VERIFIED PETITION PURSUANT TO ARTICLE 78, C.P.L.R. TO REQUIRE RESPONDENTS TO TERMINATE THEIR POLICY OF PERMITTING UTILITIES TO CHARGE CUSTOMERS FOR CHARITABLE CONTRIBUTIONS

PRELIMINARY STATEMENT

1. The New York State Public Service Commission has a well-established policy of allowing the utilities it regulates to pass on as rate charges to their customers donations to religious and other charitable organizations. Customers are not given any choice to determine the recipients of these donations under Respondents' policy. Petitioner challenges this policy solely on the ground that it violates his First Amendment rights of free expression, free exercise of religion and against establishment religion. He seeks an order precluding future implement of this policy.

Respondent Cahill's Petition

PARTIES

2. Petitioner Joseph Cahill is a 63-year old United States citizen who is a resident of Dutchess County. Petitioner has lived in the town of Fishkill for the past 25 years and was an IBM project manager prior to his retirement which resulted from disability. Petitioner Cahill is a practicing Roman Catholic.

3. The Respondents are the New York State Public Service Commission and its members and are proceeded against here only in their capacity as policy-makers and only insofar as they are directly responsible for the policy challenged by the Petitioner. The Respondents' duties include fixing rates for all public utilities in New York State and as such it is their policy to pass on the cost of charitable donations by the utilities to the customers rather than to require the stockholders of these utilities to bear the burden of charitable donations. The Respondents' policy does not provide any opportunity for customers who object to the recipients of these donations to withhold or otherwise indirect such donations.

FACTUAL ASSERTIONS

4. Prior to 1970, the Respondents did not include charitable donations as a cost of doing business in fixing the rate structures of New York State public utilities. Beginning 1970, however, this policy changed and Respondents have consistently authorized expenditures for charitable donations in accordance with their policy as described in paragraph 3 and the proposed tariffs submitted by the utilities in the rate setting process.

5. The amount of charitable donations authorized for each utility by the Respondents is set pursuant to a formula based upon the rate of inflation and the amount of charitable donations of each utility prior to the 1970 implementation of the Respondents policy of allowing utilities to charge customers for charitable donations.

6. On June 22, 1984, Respondents specifically authorized New York Telephone Company to charge its customers, one of whom is Petitioner, for its charitable donations at approximately $3,000,000 in 1984. That determination became final on October 10, 1984. Thereby, Respondents authorized the New York Telephone Company to make charitable donations to several thousand charities. Among these are several which either are themselves or support, religious institutions of faiths which expound beliefs inconsistent with the Petitioner's belief and practice of Catholicism. Also, among these charities are several which support the right to an abortion to which the Petitioner objects on moral and religious grounds. And, finally, among these charities there are several which support activities and causes to which Petitioner objects on political or personal grounds.

7. Petitioner objects as a matter of principle to being compelled to support these charities in particular, and all charities in general, by means of including coerced contributions in his utility bills no matter how small a portion his bill is affected by Respondents' policy. Petitioner has never been informed either by Respondents or by the utilities which serve him of the fact that a portion of his utility payments are being diverted to charities. Further, Petitioner has never been informed of the specific charities to which this portion of his payments are being diverted. Finally,

Respondents have failed to adopt any procedure which would allow Petitioner to withhold his contribution or redirect his contribution to organizations to which he does not object.

8. Respondent permits the New York Telephone Company and all New York utilities which it regulates to dispose of their charitable contributions extracted from their customers in any manner each utility determines without any protection for the interests of the customers.

9. Plaintiff has no alternative means of obtaining the basic utility services which the New York Telephone Company provides him in his home geographic area.

10. No previous application for the same or similar relief has been made except that an action in the Southern District of New York was filed on August 1, 1984, and subsequently dismissed upon the stipulation of the parties because the federal courts lack jurisdiction over challenges to rate orders under 28 U.S.C. § 1342.

CAUSE OF ACTION

11. Based upon paragraphs 1-10 above, the Respondents have denied Petitioner the rights to free expression and free exercise of religion as well as against establishment of rligion under the First Amendment of the United States Constitution.

WHEREFORE the Petitioner respectfully prays that this Court

a) Enter an order directing the Respondents to adopt a policy of setting utility rates which eliminates the practice

of charging utility customers for the charitable contributions made by utilities;

b) Enter an order vacating the Respondents' rate order of June 22, 1984, with the direction that such rate order be amended to eliminate authorization for charging New York Telephone customers for the charitable contributions which that utility makes;

d) Enter an award of attorneys' fees and costs in favor of the plaintiff pursuant to 42 U.S.C. § 1998.

e) Grant such other relief as the Court deems necessary and appropriate.

Dated: October 16, 1984
New York, New York

/s/ RICHARD EMERY, ESQ.
Richard Emery, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011
212-924-7800

Attorney for Plaintiff

Verification of Petition

SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

Index No.

Joseph Cahill,

Petitioner,

—against—

The Public Service Commission, et al.,

Respondents.

VERIFICATION OF PETITION

State of New York }
County of New York } ss.:

I, Joseph Cahill, being first duly sworn, depose and say I have read the Petition Pursuant to Article 78, C.P.L.R., made in my name against the Public Service Commission, its Chairman and Commissioners. The allegations contained therein are true of my own personal knowledge, except for those statements made on information and belief and as to those I have reason to believe they are true.

Further deponent saith not.

/s/ Joseph E. Cahill
Joseph E. Cahill

Sworn to before me this
16th day of October, 1984.

/s/ Richard Emery
Notary Public

Public Service Commission Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 12464-84

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

DAVID E. BLABEY, being duly sworn, deposes and says:

1. I am Counsel to the Public Service Commission of the State of New York and the attorney for the respondents in the above-entitled action. I make this affidavit in support of the respondent's motion to dismiss.

2. This action was commenced by service of a petition and notice of petition on the Commission on October 19, 1984.

3. The petition alleges that the Public Service Commission, beginning in 1970, authorized expenditures for char-

itable donations by New York State utilities through the rate setting process. This policy purportedly violates the First Amendment rights of freedom of expression and asso-citation and against establishment of religion.

4. The petition asks the Court to direct respondents to adopt a policy excluding charitable donations from utility rates, to find inclusion of such donations in rates unconstitutional, to vacate the respondent Commission's rate order of June 22, 1984, with the direction that such rate order be amended to eliminate from rates amounts attributable to charitable contributions made by the New York Telephone Company, and to award the plaintiff his attorney's fees and costs.

5. New York State utilities have made charitable contributions for many years. Charitable contributions are considered a legitimate cost of doing business and, therefore, constitute a proper ratemaking expense. Upon information and belief, New York charities receive and depend on substantial utility donations.

6. The Public Service Commission first permitted New York utilities to include in rates a reasonable allowance for charitable donations in 1970. New York Telephone Company, Case 25155, 84 P.U.R.3d 321 (1970). A copy of the relevant portions of this order is attached hereto as Exhibit A.* The Commission, however, has never *ordered* utilities to make charitable contributions generally or religious donations secifically. While it has allowed charita-

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* Exhibit A has not been separately reproduced in this Appendix. The excerpts from Case 25155 contained in Exhibit A appear in the Appendix at pp. A45-47.

ble contribution expenses to be included in estimates of utility expenses, the Commission has never interfered with the utilities' selection of donees. And, upon information and belief, no party in a Commission proceeding has ever challenged allowances for charitable donations expenses on religious or freedom of expression grounds.

7. In Case 28601, the most recent case setting rates for New York Telephone Company, the Commission continued to allow charitable contribution expenses to be used to determine that company's revenue requirement. New York Telephone's charitable contribution rate allowance was computed by using its level of contributions in 1969 as a benchmark, with an adjustment for inflation since that date. If the company makes contributions in excess of this adjusted benchmark, that expense will be shouldered by its stockholders. A copy of the relevant portions of Opinion No. 84-16 in Case 28601 is attached hereto as Exhibit B.*

8. The Commission, therefore, does not intrude upon the utilities' discretion in making contributions. The utilities select which organizations shall receive contributions and the amount of each contribution. The utilities may choose to make no contributions or contributions in excess of the amount allowed in rates. Of course, if a company does not make contributions in a given test period, it will likely not receive a rate allowance for contributions expenses in its next rate decision.

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* Exhibit B to this affidavit has not been separately reproduced in this Appendix. The portion of Opinion 84-16 which are contained in Exhibit B appear in this Appendix at pp. A40-44.

THE COURT HAS NO SUBJECT MATTER JURISDICTION BECAUSE THE PUBLIC SERVICE COMMISSION HAS EXCLUSIVE PRIMARY JURISDICTION OVER THE REASONABLENESS OF UTILITY RATES

9. The Commission is empowered under Public Service Law Sections 91 and 92 to set "just and reasonable" utility rates. This jurisdiction is exclusive and supersedes all common law remedies of the customer against the company. *Purcell* v. *New York Central Railroad Company*, 268 N.Y. 164 (1935), cert. denied, 294 U.S. 574.

10. Courts have recognized the Commission's exclusive, original jurisdiction over rates. As one court has stated:

> Tariffs on file with the Public Service Commission are presumed to be reasonable and must be attacked in the first instance before the Public Service Commission (*People ex rel. Public Serv. Comm. of State of N.Y.* v. *New York Tel. Co.*, 262 App. Div. 440, 444, affd. 287 N.Y. 803). Where the reasonableness of a public utilitie's practices is challenged, the doctrine of primary administrative jurisdiction is applicable, and the Public Service Commission is the proper body to pass on the question of reasonableness (Matter of *Leitner* v. *New York Tel. Co.*, 227 N.Y. 180, 189, mot. for rearg. den 278 N.Y. 598; *Freedom Fniance Co.* v. *New York Tel. Co.*, 29 A.D. 2d 545; *Murray* v *New York Tel. Co.*, 170 App. Div. 17, affd. 226 N.Y. 590). *Van Dussen-Storto* v. *Rochester Telephone Co.*, 42 A.D. 2d 400, 402 (1973).

11. The rate treatment of charitable contributions expenses constitutes an integral part of the ratemaking function. Any challenge to this function, including a claim of violation of a constitutional right, should be initially addressed to the Commission. See *Karp* v. *Consolidated Edison Co. of NY,* Slip Opinion No.'s 71 and 151 (Sup. Ct. New York Co., September 26, 1984, Edwards, J.) (A copy of this opinion is attached hereto as Exhibit C).

12. The issue of the constitutionality of the Commission's contributions practice under the First Amendment has, to the best of my knowledge, never been raised before the Commission. Because the Commission has exclusive primary administrative jurisdiction over claims which affect the reasonableness of rates, petitioner's claim should not be heard by the court until it has been heard and decided by the Commission.

13. Parties other the than petitioner did raise objections to the charitable contributions practice in Case 28601. These challenges, however, were not based on alleged violations of the First Amendment. Thus, the question raised in the petition, which is essentially a ratemaking issue, has never been raised before the Commission, which, again, has primary jurisdiction of the ratemaking process.

THE PETITION SHOULD BE DISMISSED BECAUSE THE PETITIONER HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

14. The doctrine of exhaustion of administrative remedies relieves the courts of deciding questions entrusted to administrative agencies, prevents premature judicial inter-

ference with administrative expertis, allows agencies to develop coordinated and consistent policies and affords the opportunity to prepare a complete record. *Watergate II Apts.* v. *Buffalo Sewer Authority,* 46 N.Y. 2d 52 (1978); *YMCA* v. *Rochester Pure Waters Dist.,* 37 N.Y. 2d 371 (1975).

15. An exception to the exhaustion doctrine exists where an agency's action is challenged as unconstitutional. *Watergate II Apts.* v. *Buffalo Sewer Auth.,* supra. This exception, however, is not applied automatically. Where the legislature has declared that a particular subject matter should be dealt with administratively, a claim must first be heard before the specified agency, notwithstanding the presence of a constitutional issue. *Matter of Patterson* v. *Smith,* 53 N.Y. 2d 98 (1981). The assertion of a constitutional claim also will not excuse a failure to exhaust if the administrative agency can provide adequate relief. *Matter of Pfaff* v. *Columbia-Green Community College,* 99 A.D. 2d 887 (1984).

16. Exceptions from the exhaustion doctrine are appropriate where the constitutional claim, such as a challenge to an agency's enabling statute, cannot be fully resolved by the agency. Where, however, the legislature has delegated responsibility over a particular subject matter to an agency and the agency is empowered to provide adequate relief, the exhaustion doctrine applies.

17. The doctrine has been invoked to dismiss an action where parties appeared before the Commission to challenge the reasonableness of the charitable contribution practice, but resorted to the courts before completing procedures before the Commission. *Stein* v. *Kahn,* Slip Opinion No. 48

(Sup. Ct. Albany County, June 24, 1977, Pitt, J.) (A copy of this opinion is attached hereto as Exhibit D).*

18. The legislature has delegated the ratemaking function to the Commission, which has developed extensive procedures for resolving ratemaking issues. The constitutional challenge to the contributions practice does not implicate statute or regulation. Rather, the challenge is to the Commission's own administrative decision, which the Commission can reverse if it decides that a conflict with the First Amendment exists. Therefore, the factors favoring application of the exhaustion doctrine outweigh factors favoring application of the exception to the doctrine.

THE PETITIONER HAS FAILED TO STATE A CLAIM UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

19. Petitioner challenges the Commission's charitable contributions practice as violative of the First Amendment, as applied to the state through the Fourteenth Amendment. A finding of "state action" is a pre-requisite to any action brought under the Fourteenth Amendment. *Blum* v. *Yaretsky,* 457 U.S. 991 (1982); *Rendell-Baker* v. *Kohn,* 457 U.S. 830 (1982); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948). State action is not present here.

20. The Commission-regulated utilities whose rates include charitable contributions are all privately owned and operated. The United States Supreme Court has expressly held that extensive regulation of a privately-owned utility

* Exhibit D has not been reproduced in this Appendix.

does not transform the policies of the utility into state action.

> [T]he inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of a regulated entity so that the action of the latter may be fairly treated as that of the state itself. . . . Approval . . ., where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into "state action." (Emphasis added) *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351, 357 (1974).

21. Constitutional standards can be invoked under the state action doctrine only when "it can be said that the state is *responsible* for the specific conduct of which plaintiff complains." (Emphasis in original). *Blum* v. *Yaretsky,* 457 U.S. at 1004. A regulation requiring state approval of a person before hiring also is "not sufficient to make a decision to discharge, made by private management, state action." *Rendell-Baker* v. *Kohn,* 457 U.S. at 842.

22. At most, the Commission's practice of allowing a contributions expense in rates recognizes that charitable contributions are a legitimate cost of doing business. However, State approval of rates to support a private act, such as the act of an investor-owned utility, is not state action. "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute

without any approval." *Cochran* v. *Public Service Commission of Oklahoma,* 421 F. Supp. 17, 19 (N.D. Okla. 1976). That court then held that such approval of a business practice did not constitute state action. *Id.* The Court of Appeals for the Second Circuit has also held that the business decisions of a regulated, privately-owned utility do not constitute state action, even though the utility is a monopoly. *Taylor* v. *Consolidated Edison Co. of N.Y.*, 552 F. 2d 39, 46 (2d Cir. 1977).

23. State courts have consistently followed this principle. In *Montalvo* v. *Consolidated Edison Co. of N.Y.*, 92 A.D. 2d 389, 395 (1983), aff'd 61 N.Y. 2d 810, the court "rejected the contention that the monopoly status of the utility made its actions attributable to the state."

24. Another New York State court has previously dismissed a First Amendment challenge to the contributions practice because the court could not find state action. *Karp* v. *Consolidated Edison Co. of N.Y.*, Slip Opinion at 3 (Exhibit C). The court stated that:

> With respect to the cause of action . . . based on an alleged violation of First Amendment guarantees, the court finds no basis upon which such cause can be sustained. The purported claim . . . does not lie because the essential element of "state action" is missing. "State action" is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the act complained of (see *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351). The Commission has stated that the practice of making

charitable contributions is purely a matter of the utility's discretion. (See Montalvo v. Con Edison, 92 AD 2d 389, 394; New York Telephone Co., supra, pp. 8-83). It is clear that the Commission does not compel the contributions nor, does it designate a particular charity or the amount of the contribution to be made. *Id.*

25. Petitioner has asserted that the Commission's rate allowance for charitable contributions compels him to finance the such contributions against his will, because the utility is his sole source of an essential service. His argument is based on an attempt to analogize his situation to that of the plaintiffs in *Abood* v. *Detroit Bd. of Education,* 431 U.S. 2909 (1977). In *Abood,* the plaintiffs were forced by statute to associate against their will with a union. *Id.* at 218 n.12, 226. The Comission's rate policy involves no such compulsion because a regulated utility does not represent its customers' views and opinions. The relationship between the two is economic only. *Abood* and its progeny are, therefore, clearly distinguishable from this case.

WHEREFORE, deponent respectfully asks for a judgment dismissing the complaint in the above-titled action.

/s/ DAVID BLABEY
David Blabey

Sworn to before me this
3rd day of December, 1984

/s/ LEONARD J. VAN RYN
Notary Public

Exhibit C to Commission Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Special Term—Part I

Index Nos. 80843/84 11127/84
No. 71 of 5/24/84
No. 151 of 5/24/84

RICHARD KARP, on behalf of himself and all others similarly situated,

Plaintiff,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and NEW YORK STATE PUBLIC SERVICE COMMISSION,

Defendants.

EDWARDS, J.:

Motions numbered 71 and 151 on the Special Term, Part I Calendar of May 24, 1984 are consolidated for disposition and are decided in accordance with the following memorandum decision.

These motions, brought by defendants Consolidated Edison Company of New York, Inc. ("Con Ed") and the New York State Public Service Commission ("the Commission"), respectively, seek dismissal of the complaint on substantially identical grounds. The basis for dismissal are that the court lacks subject matter jurisdiction over the monetary claims asserted against the Commission, failure to state a cause of action under Sections 65 and 66 of the

Exhibit C to Commission Affidavit in Support of Motion to Dismiss

Public Service Law and under Title 42 U.S.C., Section 1983, that this action, improperly denominated a class action seeking declaratory and injunctive relief, is time-barred pursuant to CPLR 217 and 3211(a)(5) and, that the court lacks subject matter jurisdiction due to the exclusive primary jurisdiction of the Public Service Commission.

The gravamen of the complaint is that Con Edison's inclusion of charitable contributions made as part of its operating expenses for the purpose of rate-making during the period April 17, 1978 to April 17, 1984, as approved by the Commission, is unlawful and violates Sections 65 and 66 of the Public Service Law which requires utilities to provide safe and adequate service at "just and reasonable" rates. Additionally, the complaint alleges that because the Commission has approved Con Edison's inclusion of donations made to religious organizations in its rates, such permission or approval constitutes "state action" within the meaning of Title 42 U.S.C., Section 1983 and is a violation of the First Amendment guarantee against the establishment of religion.

Turning to the requested relief, the court finds that these motions involve exclusively matters of law and are, therefore, appropriate for summary judgment.

Since 1970, it has been the established policy of the Public Service Commission to approve the practice of inclusion of charitable contributions as an element of operating expense by a public utility on the ground that such expenses are "just and reasonable" utility operating expenses (New York Telephone Company, 84 P.U.R. 3d 321, 349). Since that time, in an unbroken line of decisions the Commission has concluded that charitable con-

tributions, in moderate amounts, are "just and reasonable" utility operating expenses. While individual Commissioners have dissented from that policy in various rate cases and while bills have been introduced in the State Legislature, though never passed, to prohibit rate recovery of charitable contributions, there is nothing found in the Public Service Law which prohibits utilities from recovering such expenses, if approved by the Commission as "just and reasonable." Indeed, the propriety of the policy was approved by this court in Stein v. Kahn, Slip Op. No. 48 (Sup. Ct., Albany Co., June 10, 1977, Pitt. J.). The court, in considering an identical challenge to charitable contributions made by Con Ed, observed that the practice is authorized by Business Corporation Law, Section 202(a) (12) which governs Con Ed's operations as an inventor-owned utility.

With respect to the cause of action asserted pursuant to 42 U.S.C., § 1983 and based on an alleged violation of First Amendment guarantees, the court finds no basis upon which such cause can be sustained. The purported claim for alleged civil rights' violation does not lie because the essential element of "state action" is missing. "State action" is present only where the state commits the act complained of or where a private entity commits an act ordinarily performed by the state or, is effectively mandated by the state to perform the act complained of (see Jackson v Metropolitan Edison Co., 419 U.S. 345, 351). The Commission has stated that the practice of making charitable contributions is purely a matter of the utility's discretion. (see Montalvo v Con Edison, 92 AD 2d 389, 394; New York Telephone Co., supra, pp. 81-83). It is clear that the Commission does not compel the contributions nor, does

it designate a particular charity or the amount of the contribution to be made.

Addressing the subject matter jurisdiction issue, the court concludes that the doctrine of exclusive primary administrative jurisdiction deprives the court of subject matter jurisdiction over those portions of the complaint which seek monetary damages. The court comes to this conclusion based upon a recognition that the contributions complained of constitute an integral part of the rate-making function of the Commission and, therefore, any challenge to the exercise of this administrative function should be, in the first instance, addressed to the particular administrative body involved (Van Dussen-Storto v Rochester Telephone Co., 42 AD 2d 400, aff'd 34 NY 2d 904). Therein, the court stated that:

> ". . . the statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and s supercede all commonlaw remedies . . . the Commission has exclusive original jurisdiction over public utility rates. . . ." (supra, at p. 403).

Even more important, by legislative enactment, the court has no jurisdiction over the monetary claims asserted against the Commission, since such entity is a State agency (Court of Claims Act, Sections 8 and 9[2]).

Finally, the court finds that this action has been improperly brought as a class action suit; apparently, in an effort to avert the consequences of the statute of limitations.

Plaintiff argues that the Commission's rate determinations are "legislative" in nature and, therefore, reviewable only in an action for declaratory relief under a six-year

statute of limitations [CPLR 213(1)]. However, the court finds this argument lacks merit. It is clear that plaintiff challenges the determination of the Commission in its rate-making function, as such it has been consistently held that all such obligations must be brought pursuant to CPLR article 78 (Abrahams v Consolidated Edison of New York, Inc. 95 AD 26 906) and within the applicable four-month statute of limitations (CPLR 217). If the four-month statute of limitations is applied, this action must be dismissed as untimely (see Solnick v. Whalen, 49 NY 2d 224).

Accordingly, the motions for dismissal of the complaint and directing the entry of judgment in defendants' favor are granted.

Dated: Sep. 26, 1984

/s/ (Illegible)
J. S. C.

New York Telephone Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 12464-84

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

AFFIDAVIT IN SUPPORT OF NEW YORK TELEPHONE COMPANY'S CROSS-MOTION TO DISMISS THE PETITION

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

GERALD E. MURRAY, being duly sworn, deposes and says:

1. I am admitted to the bar of the courts of the State of New York and am one of the attorneys for New York Telephone Company (the "Company") in this proceeding and am familiar with the facts relating to the proceeding.

2. I make this affidavit in support of the Cross-Motion of the Company to dismiss the petition herein pursuant to CPLR §§ 2215, 3211(a).

3. As shown in the annexed brief, the petition should be dismissed because:

- o The Court lacks jurisdiction over the subject matter of the petitioner's cause of action. CPLR § 3211(a)(2);
- o The petition fails to state a cause of action. CPLR § 3211(a)(7);
- o The petitioner's cause of action may not be maintained because of the statute of limitations. CPLR § 3211(a)(5).

As also shown in the annexed brief, if the petition is not dismissed, the Court must, pursuant to CPLR § 7804(g), transfer the matter to the Appellate Division, Third Department.

4. The petitioner states that he is a customer of the Company. Petitioner requests an order pursuant to CPLR Article 78 directing respondents to vacate the Public Service Commission's June 22, 1984 *New York Telephone Company* Rate Case Order (Case 28601, — N.Y.P.S.C. —) and amend that Order to eliminate authorization for the Company charging customers rates which recover the Company's charitable contributions; and directing the Commission to adopt a policy which eliminates the practice of charging utility customers rates which recover the charitable contributions made by utilities. Petitioner also seeks an award of attorney's fees and costs.

5. Petitioner argues that the reflection of charitable contributions in utility rates violates petitioner's First Amendment rights of free expression, free exercise of religion and against establishment of religion.

New York Telephone Affidavit in Support of Motion to Dismiss

6. While the petition should be dismissed and accordingly the Court should not reach the merits of the petition at this time, the following facts are important in placing the matter of the petition in proper perspective.

7. The Company's rates for telephone service are fixed by the Public Service Commission (the "Commission") in the manner prescribed by Article 5 of the Public Service Law. In general, Article 5 requires the Commission, after public hearings, to fix utility rates that are "just and reasonable" to the utility and its customers. Public Service Law §§ 91-92, 97. In this process, the Commission sets rates that are designed to give the utility an opportunity to recover its reasonable expenses incurred in providing utility service.

8. Since 1970, the Commission's policy has been to permit utilities to reflect in rates a certain level of contributions made by utilities to charitable organizations on the ground that such expenses are "just and reasonable" utility operating expenses. In announcing its policy in a *New York Telephone Company* rate case, the Commission stated:

> "We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Case 25155, 10 N.Y.P.S.C. 345, 378, 84 P.U.R.3d 321, 349 (1970), quoting from *United Gas Pipe Line Co.,* 31 F.P.C. 1180, 1189, 54 P.U.R.3d 285, 295 (1964).

9. In an unbroken line of decisions since that time, the Commission has concluded that charitable contributions, in moderate amounts, are "just and reasonable" utility operating expenses that should properly be recovered in rates. Bills have been introduced in the State Legislature to prohibit rate recovery of contributions, but these bills have never passed.

10. The Commission has carried out its ratemaking policy as to contributions in the following manner. Consistent with the Commission's policy of determining utility rates based on forecasts of all utility operating expenses during what is known as a "future test year," the Company presents in its rate cases a forecast amount of charitable contributions to be made in the future test year. The Commission allows the level of charitable contributions reasonably forecast by the Company, provided that the forecast level does not exceed the benchmark level of the Company's contributions prior to 1970—that is, prior to the time the Commission began to permit rate recovery of these expenditures—adjusted for inflation as measured by the Consumer Price Index, and provided that the contributions are not demonstrably imprudent.

11. The charitable contributions reflected in the Company's most recently concluded rate case (Case 28601—the case addressed by petitioner), in which petitioner did

not participate, were set in this manner by the Commission.[1] Petitioner states, incorrectly, that it is the Commission's policy to have the Company's customers bear the entire cost of the Company's contributions. Memorandum in Support of Petition, p. 2. In Case 28601, the Company projected it would make $6.5 million in charitable contributions in the future test year. The Commission allowed only $2.1 million of those contributions to be recovered in rates (*see* Appendix A);* further, the Commission reduced the rate award to reflect the Federal income tax-reducing effect of the Company's deduction of charitable contributions. Thus, the Commission's policy has been such that the Company's stockholders bear a very substantial portion of the Company's charitable contributions expense.

The Commission held in its Case 28601 rate case order (p. 57):

> "Here, as on numerous prior occasions, we reject the consortium's claim that all charitable contributions must be disallowed, because we have long held that the company's legitimate, necessary expenditures include such contributions unless they are demonstrably imprudent."

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[1] Appendix A to this Affidavit includes a copy of the portion of the Commission's June 22, 1984 Opinion and Order in Case 28601 relating to contributions.

Petitioner states that he has not been informed that the Company's rates reflect a portion of the Company's charitable contributions. Petition, p. 3. However, in the Company's rate cases the public has always been provided full notice and opportunity to be heard on any issue, including charitable contributions.

* The Appendices to this Affidavit have not been reproduced in this Appendix. The portions of Appendix A to this Affidavit which are excerpts from the Commission's decision in Case 28601 appear at pp. A40-44 of the Appendix.

Whereas petitioner alleges that the Company's contributions are not "germane" to its utility service (Memorandum in Support of Petition, pp. 7, 11), the uncontested evidence in Case 28601 demonstrated that the Company's contributions benefit the Company's ratepayers in a number of ways and are an integral cost of the Company's utility business. The evidence demonstrated, *inter alia,* that the Company's contributions: aid public services that the Company might otherwise have to incur costs to provide; contribute to producing quality managers of the Company's business; improve the economic, social and political environment in the Company's operating territory, thus enabling the Company to attract and retain qualified employees, improve productivity, hold cost increases to the lowest possible level, and attract new business and promote residential growth, thus leading to a healthier market and expanding revenues for the Company. Transcript pages 3397-98 in Case 28601, included in Appendix B hereto.*

12. Several aspects of the Commission's ratemaking procedure with regard to contributions should be emphasized.

First, the Commission has not compelled any utility to make *any* charitable contributions, let alone a particular level of such contributions. *See* also Affidavit in Support of Public Service Commission's oMtion to Dismiss, p. 2. The Commission's policy has consistently been to permit rate recovery of a forecast level of contributions, so long as the forecast level does not exceed the pre-1970 benchmark amount adjusted for inflation, and the contributions are not

* Appendix B is not reproduced in this Appendix.

demonstrably imprudent. The expense of any contributions over that adjusted benchmark and within the Commission's jurisdiction is borne by the Company's shareholders. The Company would be free under the Commission's policy to make no charitable contributions whatsoever.

Second, the Commission has consistently declined to designate the organizations to which such contributions should be made. The Commission's explicit policy has been that charitable contributions are made pursuant to "an exercise of discretion by the company" rather than a directive from the Commission. *E.g., New York Telephone Company,* PSC Case Nos. 27710, 27651, Slip Opinion No. 81-3, January 19, 1981, pp. 72-73.

Third, the Company does not provide funding for religious organizations when denominational or sectarian in purpose.

Fourth, the Commission's policy on contributions has already withstood judicial review. In 1977, this Court (Justice De Forest C. Pitt) dismissed an Article 78 proceeding to review the Commission's policy on the ground that the petitioner had not exhausted his administrative remedies and on the further ground that, given the provision of the New York Business Corporation Law permitting utilities to make charitable contributions (B.C.L. § 202(a)(12)), the Commission did not act unlawfully in permitting recovery of charitable contributions. *Stein* v. *Kahn,* Slip Op. No. 48 (Sup. Ct. Albany County, June 10, 1977). (A copy of this decision is included as Ex. D to the Affidavit of the Commission in support of its motion to dismiss.)

New York Telephone Affidavit in Support of Motion to Dismiss

And, as recently as September 26, 1984, the New York Supreme Court, County of New York (Edwards, J.) ordered dismissal of an Article 78 proceeding challenging the Commission's contributions policy on First Amendment grounds, the same grounds invoked by petitioner. *Karp* v. *Consolidated Edison Co. of N.Y.*, Index Nos. 80843/84, 11127/84. (A copy of this decision is attached as Ex. C to the Affidavit of the Commission in support of its motion to dismiss.) The court observed, *inter alia,* that it lacked subject matter jurisdiction because state action was not present and because of the exclusive primary jurisdiction of the Commission. These court decisions are addressed in more detail in the annexed brief.

WHEREFORE, it is respectfully requested that the Court granted judgment dismissing the Article 78 petition.

/s/ GERALD E. MURRAY
Gerald E. Murray
Attorney for
New York Telephone Company

/s/ MIGUEL A. ROSA
Notary Public

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 12464-84

JOSEPH CAHILL,

Petitioner,

—against—

THE PUBLIC SERVICE COMMISSION; PAUL L. GIOIA, Chairman; and Commissioners EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD and ROSEMARY S. POOLER,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WALTER A. BOSSERT, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Gould & Wilkie, counsel to Central Hudson Gas & Electric Corporation ("Central Hudson"), and make this affidavit in support of Central Hudson's motion to dismiss this proceeding pursuant to Section 3211(a) of the Civil Practice Law and Rules ("CPLR").

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

2. This proceeding was commenced by service of a notice of petition and verified petition, attached hereto as Exhibit A, on October 19, 1984.*

3. This is a special proceeding brought under Article 78 of the CPLR by an individual against the Public Service Commission of the State of New York ("PSC") and its individual commissioners for the purposes of obtaining an order of the Court to the principal ends of:

> (a) vacating the PSC's rate order of June 22, 1984, which order authorized rates permitted to be charged by New York Telephone Company; and directing that such rate order be amended to eliminate authorization for charging customers of New York Telephone Company for the charitable contributions which that utility makes; and
>
> (b) directing the PSC to adopt a policy excluding charitable donations made by utilities from its customers through rates;

the crux of petitioner's case being that the policy of the PSC permitting inclusion of such donations in utility rates is unconstitutional as a violation of a utility ratepayer's rights of freedom of expression, free exercise of religion and against establishment of religion which are guaranteed under the First Amendment to the Constitution of the United States of America, on the principal grounds that, under the policy of the PSC, customers of utilities are not given any choice to determine the recipients of the donations made by the utility, or to withohld donations from or to redirect donations to charities of their choosing.

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* Mr. Cahill's petition appears at pp. A48-53 of this Appendix.

Central Hudson Gas & Electric Corporation's Affidavit in Support of Motion to Dismiss

4. Central Hudson is a corporation formed under the Transportation Corporations Law of the State of New York to provide electric and gas service within its service territory located in the mid-Hudson River Valley region of New York State. It is a gas and electric corporation within the meaning of the Public Service Law, and, as such, its rates, charges and practices are subject to the jurisdiction and approval of the PSC. The policy of the PSC first expressed in its 1970 New York Telephone Company rate order (New York Telephone Company, Case 25155, 84 P.U.R. 3rd 321 (1970)) of considering charitable donations to be proper business expenses when establishing the reasonableness of utility rates is applicable equally to Central Hudson as it is to New York Telephone Company and to all other utilities in New York State which are subject to the jurisdiction of the PSC. Pursuant to such policy of the PSC, in determining the reasonableness of Central Hudson's rates, the PSC has considered charitable donations to be reasonable business expenses.

I. THE PETITION SHOULD BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER RAISED IN THE PETITION (CPLR 3211(a)(2)).

A. The Petition Should Be Dismissed Because the PSC Has Exclusive Primary Jurisdiction Over the Reasonableness of Utility Rates.

5. The petition should be dismissed because the PSC has exclusive primary jurisdiction over the reasonableness of utility rates. Public Service Law, § 66(12).

B. The Petition Shoud Be Dismissed Because the Petitioner Has Failed To Exhaust His Administrative Remedies.

6. Upon information and belief, petitioner herein has never requested the PSC to pass upon the validity or applicability of the policy of the PSC first expressed in its 1970 New York Telephone Company rate order (New York Telephone Company, Case 25155, 84 P.U.R. 3rd 321 (1970) of considering charitable donations to be proper business expenses when establishing the reasonableness of utility rates nor the validity or applicability of permitting recovery in rates charged to customers of New York Telephone Company's costs associated with charitable donations made by New York Telephone Company authorized in its most recent rate case before the PSC (Case 28601), Opinion 84-16, dated June 22, 1984).

7. The PSC has, in 16 NYCRR § 9.1, prescribed a procedure for rendering declaratory rulings under Section 204 of the State Administrative Procedure Act ("SAPA") with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it.

8. The failure of petitioner to so request the PSC to pass upon the validity or applicability of the rates established in PSC Cases 25155 and 28601 contravenes the express requirements of SAPA § 205, which specifies that a special proceeding may not be maintained unless the petitioner has first so requested the agency to render a declaratory ruling with respect thereto. Petitioner's failure to so request constitutes an absolute bar to his bringing this proceeding (SPA § 205), and accordingly, the court should

dismiss this proceeding for lack of subject matter jurisdiction (CPLR 3211(a)(2)).

9. Upon information and belief, petitioner herein never appeared before the PSC in Case 25155 nor in Case 28601, although public notice of each proceeding was duly given; and, accordingly, petitioner never raised wtih the PSC the issues raised by petitioner in the within proceeding.

10. It is a proposition which hardly needs citation, that before a person attempts to invoke the jurisdiction of a court to review a determination of a public service commission, that party should first provide the public service commission with an opportunity to rule on the matter. This is the fundamental premise incorporated in the doctrine of exhaustion of administrative remedies.

11. The failure of petitioner to appear before the PSC in Cases 25155 and 28601 and to raise the issues raised by petitioner in the within proceeding is a failure to exhaust petitioner's administrative remedies and constitutes an absolute bar to his bringing this proceeding (CPLR 3211 (a)(2)).

II. THE PETITION SHOULD BE DISMISSED BECAUSE THE PETITION FAILS TO STATE A CAUSE OF ACTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA (CPLR 3211(a)(7)).

12. The PSC does not compel utilities to make donations to charities, nor does the PSC direct utilities to donate to

named charities. Accordingly, there is no "state action" (i.e. there is no violation of petitioner's First Amendment guarantees as applied to the state through the Fourteenth Amendment) in this proceeding, and, accordingly, the petition fails to state a cause of action and should be dismissed (CPLR 3211(a)(7)).

WHEREFORE, deponent respectfully asks for a judgment dismissing the petition in the above-entitled proceeding.

/s/ WALTER A. BOSSERT, JR.
Walter A. Bossert, Jr.

Sworn to before me this
11th day of December, 1984.

/s/ PENELOPE SKELOS
Notary Public